IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY and DEE THOMASON FORD,

Petitioners,

vs.

DENNIS MILHOLLIN and MICHELLE MILHOLLIN,

Respondents.

FORD MOTOR CREDIT COMPANY,

Petitioners,

vs.

DONNA M. EATON,

Respondent.

(Caption continued on next page)

RICHARD A. SLOTTEE
Northwestern Legal Clinic
310 Southwest Fourth Avenue
1018 Board of Trade Building
Portland, Oregon 97204

Counsel for Respondents

FORD MOTOR CREDIT COMPANY and MARV TONKIN
FORD SALES INC.,

Petitioners,

vs.

DARRELL MESSINGER,

Respondent.

FORD MOTOR CREDIT COMPANY and WEBSTER-WOLFARD
FORD, INC.,

Petitioners,

vs.

DAVID P. ANDRESEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents DENNIS MILHOLLIN, MICHELLE MILHOLLIN, and DONNA EATON respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 588 F 2d 753.

QUESTIONS PRESENTED

Respondents accept the petitioners' statement of the Questions Presented, and add the following issue:

4. Whether the creditor must disclose the amount or method of computing the amount of a finance charge rebate in the event of an acceleration of the unpaid balance of the indebtedness caused by the debtor's default.

STATEMENT OF THE CASE

Respondents accept petitioners' Statement of the Case, with the following revisions:

1. The District Court held that Ford Motor was the actual creditor in the transactions involving DENNIS MILHOLLIN, MICHELLE MILHOLLIN and DONNA EATON. The automobiles were therefore purchased from Ford Motor as well as the dealers, and the contracts were executed in favor of Ford Motor.

2. The District Court ruled that DENNIS MILHOLLIN and MICHELLE MILHOLLIN could not recover damages for the failure to disclose the acceleration clause on the face of the contract, since that duty of disclosure was prospective only from the date of decision of Woods v. Beneficial Finance Company, 395 F Supp 9 (D. Or. 1975). The Ninth Circuit reversed this portion of the District Court's ruling.

3. The decision of the Ninth Circuit conflicts with the decisions of five Circuits primarily on the theory of the acceleration clause disclosure. Four of the six Circuits considering the issue have held that in certain situations an acceleration clause is a required disclosure. Two of the Circuits have rejected the conclusion. All six Circuits are in accord in rejecting the proposition that the right to accelerate is a charge required to be disclosed under §226.8(b)(4) of Regulation Z. Only one Circuit has considered and rejected the approach of the Ninth Circuit and this rejection was based on the lack of clear guidelines from the Federal Reserve Board. While the Circuits may not be in complete accord at the present time, the possibility of uniformity of decisions exists in the future.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Below Was in Accord With the Pronouncements of the Federal Reserve Board.

The Federal Reserve Board has issued one staff opinion, one official interpretation, and two public information letters regarding disclosure of an acceleration clause under the provisions of the Truth in Lending Act. None of these pronouncements are in conflict with the decision below.

The first remarks of the Board were contained in a staff opinion letter issued in October of 1974. The Board equated prepayment with acceleration, and indicated that under certain circumstances an acceleration clause would have to be disclosed pursuant to §226.8(b)(7).

> For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of §226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under §226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act.
>
> Staff Op'n. Letter No. 851 (Oct. 22, 1974), Cons. Cred. Guide paragraph 31, 173.

The decision below was in accord with this analysis, as it also equated prepayment with acceleration. While the Board did not directly confront the issue of disclosure where rebates under prepayment and acceleration are identical, the Ninth Circuit confronted the issue by simply extending the reasoning of the Board to its logical conclusion.

In April of 1977 the Board issued an official staff interpretation, which stated among other conclusions, that:

> You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under §226.8(b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed

under §226.8(b)(4).

> No. FC-0054, 42 F.R. 18056 (Ap 4, 1977) Cons. Cred. Guide paragraph 31, 552.

Again, the decision below is not in conflict with this interpretation. The Board is focusing on disclosure under §226.8(b)(4), and has not confronted the issue of disclosure under §226.8(b)(7). The Ninth Circuit has simply incorporated into its decision the Board's reasoning as to the intent of §226.8(b)(7).

In 1978 the Board issued a public information letter which further clarified its reasoning as to §226.8(b)(7).

> There is an additional consideration which the staff would also call to your attention. Even where a creditor's policy is to rebate unearned finance charges in the event of prepayment upon acceleration in accordance with State law, so that no charges are retained in excess of those indicated by the disclosed rebate method, a statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by §226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of §226.6(c) of Regulation Z. If this additional information is misleading or confusing or contradicts, obscures, or detracts attention from the required §226.8(b)(7) disclosure, there would be a violation of the regulation. Of course, the capacity of the additional information to mislead or confuse can only be determined by reference to all of the circumstances of a particular case.
>
> Public Information Letter No. 1324, (November 14, 1978) Cons. Cred. Guide paragraph 31, 827.

As with its prior pronouncements, the Board was primarily concerned with §226.8(b)(4). However, the Board did indicate that the disclosure of an acceleration clause without a concurrent disclosure as to rebate policy under acceleration had the capacity to mislead the consumer. This is almost identical to the reasoning of the Ninth Circuit. The only dif-

ference between the Board and the Ninth Circuit is that the Board chose §226.6(c) as the basis for violation while the Ninth Circuit chose §226.8(b)(7).

The final pronouncement of the Board, a short public information letter issued in 1977, did not vary from the reasoning utilized in the other Board opinions. Public Information Letter No. 1208, (July 6, 1977) Cons. Cred. Guide paragraph 31, 647.

In all of its pronouncements the Board has declared that the right of acceleration is not a charge required to be disclosed under §226.8(b)(4). This is in accord with all six Circuits which have considered the issue. The Board has never directly considered the approach taken by the Ninth Circuit, and has never rejected that approach. While the Board has been concerned with disclosure under §226.8(b)(4), the statements and reasoning used in connection with §226.8(b)(7) are clearly in accord with those of the decision below.

2. The Conflict Between the Circuits Is Neither as Conclusive Nor as Direct As Suggested By Petitioners.

The Third Circuit has not ruled on the issue of acceleration clause disclosure where state law does not require rebate of the unearned finance charge upon acceleration. Johnson v. McCrackin - Sturman Ford, Inc., 527 F 2d 257, 260 n. 3 (3d Cir. 1975). The Third Circuit may ultimately be in accord with the Ninth Circuit that in certain circumstances the Truth in Lending Act does require disclosure of an acceleration clause.

The District of Columbia Circuit is in accord with the Third Circuit, and ultimately may not be in conflict with the Ninth Circuit as far as disclosure of acceleration clauses under certain circumstances. Price v. Franklin Investment Co., 574 F 2d 594 (D. C. Cir. 1978).

The Fifth Circuit would also require disclosure of an acceleration clause in certain circumstances. McDaniel v.

Fulton National Bank, 576 F 2d 1156 (5th Cir. 1978).

The Eighth and Tenth Circuits stand alone in holding that an acceleration clause need not be disclosed. Griffith v. Superior Ford, 577 F. 2d 455 (8th Cir. 1978); Begay v. Ziems Motor Co., 550 F. 2d 1244 (10th Cir. 1977).

3. The Decision Below Was Correct and In Accord With the Provision of the Truth in Lending Act and Regulation Z.

It is undisputed that §226.8(b)(7) requires disclosure of the amount or method of computing the amount of the finance charge rebate in the event of prepayment. It is clear that the Federal Reserve Board, which has been charged with interpretating and enforcing Regulation Z, equates prepayment with acceleration. Given these two factors, the decision below that the Truth in Lending Act requires disclosure of the effect on the finance charge rebate in the event of acceleration is logical and compelling.

Petitioners state that few creditors could have foreseen the ruling of the Ninth Circuit and that these heretofore unforeseen violations may result in huge penalties being imposed against creditors. Fear of imposing financial penalties against the credit industry should not be a reason for the Court's intervention in this matter. Further, the decision below was certainly not unforeseen. In Oregon, the acceleration clause has been a required disclosure since 1975. Woods v. Beneficial Finance Co., 395 F Supp. 9 (D. Or. 1975). As early as 1974, other District Courts were holding that an acceleration clause was a required disclosure. Pugh v. American Tractor Trailer Training, Inc., Cons. Cred. Guide paragraph 98, 827 (D. Conn. 1974). Respondents suggest that the petitioner's claim of surprise is more properly just a statement that they disagree with the decision below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Richard A Slottee

RICHARD A. SLOTTEE
Northwestern Legal Clinic
310 Southwest Fourth Avenue
1018 Board of Trade Building
Portland, Oregon 97204

Counsel for Respondents
Milhollin and Eaton